UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES
NEW YORK BRANCH OFFICE

EMLO CORPORATION

and Case No. 29-CA-135944

ASBESTOS, LEAD 7 HAZARDOUS
WASTE LABORERS UNION, LOCAL 78,
LABORERS' INTERNATIONAL UNION
OF NORTH AMERICA

Jaime D. Cosloy, Esq
for the General Counsel

Peter M. Kutil, Esq.,
(*King & King, Pelham, NY*)
for the Respondent

Tamir W. Rosenblum, Esq.
(*Mason Tenders District Council,
New York, NY*)
for the Charging Party

DECISION

Statement of the Case

Mindy E. Landow, Administrative Law Judge. On September 3, 2015, the Board issued its Decision and Order in this matter, in which it adopted in full the findings and conclusions of the administrative law judge and, among other things, directed that Emlo Corporation, Inc., (Respondent) honor and abide by the term of the 2014-2015 collective bargaining agreement between Respondent and Asbestos, Lead & Hazardous Waste Laborers, Local 78, Laborers' Union of North America (Union) and make all contractually required contributions to the Mason Tenders' District Council Trust Funds (Union benefit funds or Funds) that it failed to make. On November 3, 2015, the United States Court of Appeal for the Second Circuit entered its Judgment (No. 15-2954) enforcing the Board's Order in full.

On July 19, 2016, the Regional Director for Region 29 issued a Compliance Specification and Notice of Hearing (compliance specification) in this matter. On August 8, 2016, Respondent filed an answer to the specification in which it "denied knowledge or information sufficient to

form a belief as to the truth of the allegations set forth in the stated notice" and set forth a series of affirmative defenses which will be discussed, as relevant, below. On August 31, 2016, counsel for the General Counsel advised Respondent's counsel that its answer was deficient in that it did not comport with the requirements of the Board's Rules and Regulations. Accordingly, the General Counsel provided Respondent with the opportunity to correct deficiencies in its answer and notified Respondent of the potential adverse legal consequences of its failure to do so.

Thereafter on Friday, September 8, 2016, counsel for the General Counsel filed a Motion for Partial Summary Judgment. As will be discussed below, this motion was addressed at the opening of the hearing.

I heard this matter in Brooklyn, New York on September 13, 2016.

General Counsel's Motion for Partial Summary Judgment

As noted, General Counsel submitted its motion shortly prior to the inception of the hearing. As it did not appear that Respondent had an adequate opportunity to respond, I allowed counsel to do so on the record upon the opening of the case.

In its motion, the General Counsel seeks partial summary judgment on paragraphs I, II, III, IV and V of its compliance specification. Section 102.56(b) of the Board's Rules and regulations requires a respondent to "specifically admit, deny or explain each and every allegation of the specification, unless the respondent is without knowledge, in which case the respondent shall so state, such statement operating as a denial…." Section 102.56 (b) further provides that "[a]s to matters within the knowledge of the respondent, including but not limited to the various factors entering into the computation of gross backpay, a general denial will not suffice. As to such matters, if the respondent disputes either the accuracy of the figures in the specification or the premises on which they are based, the answer shall specifically state the basis for such disagreement, setting forth in detail the respondent's position as to the applicable premises and furnishing appropriate supporting figures." Section 102.56 (c) provides that if a respondent files an answer to the specification but does not deny any allegation in the manner required by the Rules and is not explained, "such allegation shall be deemed to be admitted to be true, and may be so found by the Board without the taking of evidence supporting such allegation and the respondent shall be precluded from introducing any evidence controverting the allegation." See also *Flaum Appetizing Corp*., 357 NLRB No. 162 (2011), citing *Mining Specialist, Inc*., 330 NLRB 99, 101 (1999) (general denial insufficient).

Paragraph I lists the discriminatees, not by name but by unit placement. A list of discriminatees by name is appended to the compliance specification as Appendix A. Counsel for Respondent averred that he had no way of knowing whether this was correct. In granting summary judgment on Paragraph I, I rely upon the obvious inadequacy of such a contention. As the employer, and signatory to a collective bargaining agreement, Respondent most certainly would have had facts available to it to rebut such an allegation with specificity. Moreover, the recommended decision and order of the administrative law judge, as enforced, is entirely consistent with the description of the discriminatees contained in paragraph I. Accordingly, I find that summary judgment with respect to paragraph I is appropriate and it is so granted.

Paragraph II sets forth the funds contribution period. Counsel for Respondent stated that he was not certain of the accuracy of the dates, but offered no alternative period of time for consideration. Again, as this information most certainly would be available to the Respondent, I find that this answer fails to meet the requirements of the Rules and Regulations and I further rely upon the records adduced by the General Counsel in the underlying case, as enforced. I therefore grant summary judgment with regard to this paragraph of the compliance specification.

Paragraph III sets forth the manner of computation of contributions to the Union's benefit funds. These are set forth in various provisions of Article VIII of the collective bargaining agreement between Respondent and the Union. The General Counsel has relied upon these contractually mandated contribution rates in establishing Respondent's obligation to the Union benefit funds. Respondent's answer to this was that it was not certain of the accuracy of the dates, but failed to explain any basis for such insecurity. Again, this answer is insufficient and I find it appropriate to grant summary judgment with respect to this paragraph of the compliance specification.

Paragraph IV sets forth the liquidated damages provision of Article VIII of the collective bargaining agreement at Section 13, subsection (f) which provides as follows:

> In the event that formal proceedings are instituted by the Trustees before a court of competent jurisdiction or arbitrator to collect delinquent contributions to such Funds or interest, and if such court/arbitrator renders a judgment/award in favor of such fund, the Employer shall pay to the fund in accordance with the judgment/award, and in lieu of any other liquidated damages, cost attorney fees, and/or interest the following:
>
> (A) The unpaid contributions
> (B) Interest on unpaid or untimely paid contributions determined by using the rate prescribed under section 6621 of title 26 of the United States Code,
> (C) An amount equal to the aforesaid interest on the unpaid contributions as and for liquidated damages.

The computation of the amount due as liquidated damages is set forth in Appendix B of the compliance specification.

At the hearing, Respondent stated that he relied upon the provisions of the collective bargaining agreement and asked that it be placed into evidence.

Based upon testimony adduced by a witness for the General Counsel, as discussed below, the contribution rates do not appear in the contract but are set forth elsewhere. Although Respondent's answer, as filed, does not meet the requirements of the Board's Rules, I find it appropriate to rely upon the record as a whole with respect to this aspect of the compliance specification.

Paragraph V of the compliance specification is a summary of the foregoing paragraphs and Appendices A and B stating Respondent's obligation to make whole the Union's benefit funds

pursuant to the Board's Order and the Court's Judgment. General Counsel contends that this will be discharged by payment to the Union's benefit funds of $77,529.30 in Fund contributions and $2,323.88 in liquidated damages for a total due of $79,855.18. Respondent asserts it is not liable for these sums due to a settlement of a collateral litigation which resulted in payments of monies in excess of such amounts to the Union. This contention, in the form of an affirmative defense, is discussed below.

The Testimony of Joseph Bianco

Joseph Bianco, Field Representative for the Union and the Funds, provided testimony relating to the accuracy of the Region's computation of the amounts due to the Union's Funds. Bianco testified that Article VIII, Section 2, of the collective bargaining agreement sets forth Respondent's obligation to make certain contributions to the Funds on behalf of employees at an hourly rate. The exact contribution rates are not set forth in the collective bargaining agreement. Rather, the exact hourly contribution rates for the employees at the LaGuardia Airport jobsite (the jobsite in question) are set forth in separate rate sheets agreed upon by Respondent and the Union.

The record demonstrates that the Union sent Respondent, by first class mail, a wage and fringe benefit rate sheet for independent asbestos contractors, such as Respondent, setting forth wages and various fringe benefit rates for the period of December 1, 2013 through November 30, 2014, a period which encompasses the relevant backpay period.

Bianco testified that in mid-June 2014, Respondent notified the Union that it would no longer honor the collective-bargaining agreement and was terminating all Union-represented employees. Bianco made a request from the Port Authority of New York and New Jersey to obtain certified payroll records from the jobsite. These records show the dates upon which Respondent continued to perform work at the LaGuardia jobsite, the names of the employees so employed and the hours worked. Using these records, it was possible to determine the number of hours worked by each individual employee on the certified payroll from June 14, 2014 through September 26, 2014. Reviewing the rate sheet for the exact hourly fringe benefit contributions for covered work, the total hourly rate amount for fringe benefit contributions is $16.95 per hour worked.[1]

[1] As the General Counsel explains, the Region then multiplied the $16.95 fringe benefit rate by the total number of hours worked as set forth in the compliance specification, i.e. 4,574 hours to arrive at its calculation that the total amount of backpay due in fringe benefit contributions is $77,729.30. With regard to the liquidated damages provision, the Region looked to the calculation of hours worked by individual employees as set forth in Appendix A and calculated 3 percent of the total amount of Funds contributions owed by Respondent on behalf of each individual employee. As noted above, the calculation of the total amount of liquidated damages is $2,325.88.

Respondent's Affirmative Defense[2]

Respondent's primary argument to contest to the General Counsel's compliance specification is that any liability here was extinguished by a settlement agreement (settlement agreement) entered into between the Union and Nasdi, LLC, which served as the general contractor for the asbestos removal project at LaGuardia airport. As Respondent argues:

> Respondent. . .submits the defense of payment and relies upon the evidence provided at the hearing. Specifically, the payment of $175,000 was made or will be made in accord with a settlement agreement, entered into between Emlo's prime contractor, Nasdi, LLC and the Union. Exhibit GC 2.
>
> As stated at trial, and as set forth in the agreement itself, the settlement agreement did not distinguish what the settlement payment was for. The Union claim at arbitration (exhibit R1), Arbitration Award (Exhibits R2, R3) was for wages and benefits; therefore payment for the settlement of such claims was for both. The fact that the agreement states that the parties do not waive their claims, does not mean that they should be paid twice for the same injury, or that the NLRB is somehow bound by such agreement between.

Both the General Counsel and the Union take the position that the settlement agreement between the Union and Nasdi did not relieve the Respondent of its liability to the Union's trust funds here. In particular, the Union points to several provisions of the settlement agreement asserted by Respondent to be a defense to the compliance specification.

Initially, it is contended, the settlement agreement by its terms does not include Emlo.[3] In particular Paragraph 3 of the settlement agreement provides as follows:

> The preceding shall not be construed to diminish or waive any claims the Union, the Mason Tenders District Council Employee Benefit Funds, or the MTDC PAC may have for outstanding dues, MTDC PAC check off or fringe benefit contributions owed for hours worked by employees of Emlo Corp on the LGA job, such amounts being understood by both parties hereto as not covered by the Award.

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[2] Respondent raises a series of additional affirmative defenses in its answer: that the complaint fails to state a claim for which relief can be granted; that Emlo complied with its obligations under the applicable collective-bargaining agreement; that the stated agreement is void and unenforceable and that the Union breached its obligations under the collective-bargaining agreement at issue relieving Emlo of any further obligation. Apart from the apparent frivolity of such claims, they were not addressed either at the instant hearing or in Respondent's post-hearing brief. Thus, it is apparent that Respondent has failed to meet its burden of coming forward with evidence to establish the merits of such asserted defenses.

[3] The settlement agreement at issue resolved an arbitration award against Nasdi.

Paragraph 4 provides:

> It is expressly agreed and understood that the Stipulation of Settlement does not settle, resolve of dispose of any claim that the Mason Tenders has or may have against Emlo Corp... . .
>
> Additionally, it is agreed and understood that the Settlement Agreement does not settle, resolve or dispose by any other action or claim Mason Tenders may have against Emlo, specifically for the unpaid wages and fringes which Emlo may not have paid.

Paragraph 5 provides, in relevant part:

> The parties hereto acknowledge and agree that Emlo Corp. is in no way a third-party beneficiary of this Settlement Agreement and both retain any and all claims they may have against Emlo Corp.

The Union further points out that the arbitration award against Nasdi (which the settlement agreement resolved) did not provide a remedy for the collective bargaining breach at issue in this case. Rather, it covers three specific Emlo collective bargaining violations: it compensates employees who worked for Emlo prior to the company's renunciation of the collective- bargaining agreement, i.e. before June 14, 2014, for time spent donning and doffing; it provides compensation to the employees who refused to accede to Emlo's condition that they work non-Union and were thus illegally not put back to work after June 14; and it similarly provides compensation to unidentified employees who would have worked on the job had Emlo not disavowed the CBA, based upon the fact that the number of workers fired was fewer than the number that worked after June 14.[4]

Thus, it is urged that none of these claims that were at issue in the arbitration area for time worked by employees subsequent to June 14. In contrast, the General Counsel's claims for fund contributions and liquidated damages apply the CBA to those employees who worked for it after June 14, 2014; specifically by failing to pay fringe benefit contributions. As the General Counsel and the Union maintain, and I find, these violations perpetrated by Emlo remain unremedied.

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[4] Contrary to counsel for the General Counsel's assertion in its post hearing brief, Union attorney Rosenblum did not testify at the hearing but, rather, made a number of representations on the record by way of background. I accept these representations as they are corroborated by the documents relating to the underlying arbitration proceedings, and settlement thereof, which Respondent urged be placed in the record.

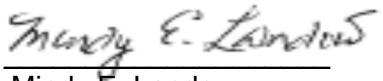
Conclusion

For the reasons set forth above, I grant the General Counsel's motion for partial summary judgment with respect to paragraphs I, II, and III of the compliance specification. I further find that there is evidence to meet the General Counsel's burden of proof with respect to paragraphs IV and V. Respondent has not met its burden of proof with respect to any of the affirmative defenses raised in its answer or at hearing.

Order

Accordingly, it is hereby ordered that Respondent make whole the Mason Tenders' District Council Trust Funds by paying delinquent fringe benefit fund contributions in the amount of $77,529.30 as set forth in Appendix A of the compliance specification and $2,323.88 in liquidated damages, as set forth in appendix B of the compliance specification, for a total due of $79,855.18.

Dated, Washington, D.C. January 4, 2017



Mindy E. Landow
Administrative Law Judge